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No. 91-1569

In the Supreme Court of the United States

OCTOBER TERM, 1991

DR. DAMON HILL, JR., STEPHANIE HILL, KATHYL ANDERSON, SANDRA SALAZAR, AND SAM SPIKES, PETITIONERS

v.

TEXAS EDUCATION AGENCY (LUBBOCK INDEPENDENT SCHOOL DISTRICT), ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioners' motion to intervene as of right under Fed. R. Civ. P. 24(a)(2).

2. Whether petitioners should have been allowed to intervene in the court of appeals after that court dismissed the government's appeal of the district court's order approving the Lubbock Independent School District's desegregation plan, dissolving the injunction, and dismissing the case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is unpublished, but the judgment is reported at 952 F.2d 399 (Table). The opinion of the district court (App., *infra*, 1a-11a) and the magistrate's recommendation denying intervention are reported at 138 F.R.D. 503. The district court's opinion on the merits approving the Lubbock Independent School District's reorganization plan, dissolving the injunction, and dismissing the case (Pet. App. B1-B72) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1991. The petition for a writ of certiorari was filed on March 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States filed this action in 1970 against the Texas Education Agency and the Lubbock Independent School District (LISD) alleging that defendants operated a segregated school system in violation of the Fourteenth Amendment. In 1988, after 18 years of litigation, the district court entered an order that LISD had achieved unitary status. Under that order, LISD could move to dismiss the case after three years, and the United States would have the opportunity to show cause at that time why the case should not be dismissed. Pet. App. B1-B2, B16-B17.

On February 1, 1991, LISD proposed a site for a new school and moved for approval of a new reorganization plan. The United States opposed LISD's motion. On March 13, 1991, petitioners, parents of school-age children who live in Lubbock, moved to intervene to oppose LISD's proposed plan. Pet. App. A2-A3. The magistrate conducted a three-day evidentiary hearing on petitioners' intervention motion (Pet. App. A3, B18) and recommended denial of the motion because the United States adequately represented petitioners' interest in a desegregated school system. Pet. App. A3.

The district court adopted the magistrate's recommendation because "[t]he Proposed Intervenors have wholly failed in showing inadequate representation on the part of the Government." App., *infra*, 8a; see Pet. App. A3. Finding instead that "[t]he record

in this case is replete with adequate and full representation by the Government," App., *infra*, 7a, the court held that petitioners had not overcome the presumption of adequacy of representation by the government, "and in addition thereto, the record * * * establishes by a preponderance of the evidence that the Government has in the past adequately represented the interest of the Proposed Intervenors." App., *infra*, 8a-9a. The court, however, allowed the petitioners to appear as amici curiae to express their views on the merits of LISD's reorganization plan. Pet. App. A3, B19. On September 18, 1991, after another extensive evidentiary hearing, the district court approved LISD's proposed plan, dissolved the injunction, and dismissed the case. Pet. App. B1-B72.

2. On petitioners' appeal of the order denying intervention, the Fifth Circuit rejected their claim that the district court should have allowed them to intervene as of right under Fed. R. Civ. P. 24(a)(2) because the United States did not adequately represent their interests. Pet. App. A7. The court ruled that adequacy of representation by the government is presumed unless there is a showing of adversity of interests, collusion, or nonfeasance, and affirmed the district court's factual findings that petitioners made no such showing here. Pet. App. A6. The court of appeals agreed that the government and petitioners share the same "ultimate goal" of achieving a unitary school district. Pet. App. A5-A6. The court also agreed that meetings between representatives of the United States and LISD "were only a part of the process of negotiation," Pet. App. A6-A7, and were not evidence of collusion. Finally, the Fifth Circuit noted that the "same district judge [who] has presided over these proceedings since their inception in 1970" wrote a 12-page opinion that "catalogues the

diligent efforts of the government to achieve desegregation in LISD." Pet. App. A3, A7. The court thus gave "great weight" to the trial court's conclusion that petitioners wholly failed to show that the government's representation was inadequate. Pet. App. A7.

3. On November 18, 1991, the United States noticed an appeal of the September 18, 1991, order on the merits, but moved to dismiss the appeal on January 17, 1992. Pet. App. C1-C3. The court of appeals granted the motion and dismissed the case on January 21, 1992. Pet. App. C4. Nine days later, on January 30, 1992, petitioners attempted to move in the court of appeals to intervene and to stay the proceedings pending the disposition of this petition for certiorari. Pet. App. D3-D16. The Fifth Circuit did not allow the motions to be filed, because there was no appeal pending. Pet. App. D1-D2.

ARGUMENT

The Fifth Circuit's decision affirming the denial of intervention under Fed. R. Civ. P. 24(a)(2) is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, there has been no change in circumstances that justifies reconsideration of the original denial. Accordingly, review by this Court is not warranted.

1. The court of appeals properly presumed (Pet. App. A6) that the government, the plaintiff in this school desegregation case since its inception in 1970, adequately represented petitioners' interest in an integrated school system. See, *e.g.*, *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961) (dictum); *Chiles* v. *Thornburgh*, 865 F.2d 1197, 1215 (11th Cir. 1989); *Texas* v. *United States Dep't of Energy (DOE)*, 754 F.2d 550, 553 (5th Cir. 1985);

United States v. *Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 985-986 (2d Cir. 1984); *United States* v. *South Bend Community School Corp.*, 710 F.2d 394, 396 (7th Cir. 1983), cert. denied, 466 U.S. 926 (1984); *Environmental Defense Fund, Inc.* v. *Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979). While that presumption may be rebutted by a showing of adversity of interests, collusion, or nonfeasance (Pet. App. A6; *Texas* v. *Doe*, 754 F.2d at 553), petitioners wholly failed to rebut the presumption.

Petitioners could not demonstrate any adversity of interests because their ultimate objective—desegregating the Lubbock public schools—is identical to the government's goal in this litigation. Pet. 29-30; App., *infra*, 6a; Pet. App. A5-A6. Petitioners claimed no other legally protectable interest that could be asserted in a school desegregation case in federal court. Pet. App. A5-A6; *Monteilh* v. *St. Landry Parish School Bd.*, 848 F.2d 625, 631-632 (5th Cir. 1988); *United States* v. *Perry County Bd. of Educ.*, 567 F.2d 277, 279-280 (5th Cir. 1978). The district court and the court of appeals also properly refused to attach any weight to petitioners' claim of collusion, finding that meetings between the government and LISD in which the United States expressed reservations about LISD's proposals were a normal part of the negotiation process. App., *infra*, 7a; Pet. App. A6-A7. Finally, the district court that presided over this case for more than 20 years found, and the court of appeals confirmed, that the record is "replete" with evidence of "full representation by the Government." App., *infra*, 7a; Pet. App. A7.

Petitioners do not now contend, much less demonstrate, that those findings are clearly erroneous. They argue instead that the court of appeals erred in presuming adequate representation by the United States.

Pet. 15-16. Petitioners contend that that presumption conflicts with *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972), which noted that the adequacy of representation requirement under Fed. R. Civ. P. 24(a)(2) "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Petitioners argue that the presumption also conflicts with an earlier D.C. Circuit case, *Smuck* v. *Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969), in which the court allowed parents to intervene after the school board decided not to appeal the trial court's decision that the board's administration of the public schools violated the Constitution.

The Fifth Circuit's holding does not conflict with either *Trbovich* or *Smuck* v. *Hobson*. This Court and the D.C. Circuit found that intervention was appropriate in those cases largely because the interests of the government and the applicants for intervention were not identical. *Trbovich*, 404 U.S. at 538-539; *Smuck* v. *Hobson*, 408 F.2d at 181. As the D.C. Circuit recently explained the cases, while the burden on the applicant for intervention to prove inadequacy of representation is "not onerous," citing *Trbovich*, there nevertheless is a "presumption" that when the government is a party, it will adequately represent the applicants' interests when their interests are the same. *Dimond* v. *District of Columbia*, 792 F.2d 179, 191-192 (D.C. Cir. 1986), citing *Environmental Defense Fund, Inc.* v. *Higginson*, 631 F.2d at 740. A potential conflict between the interests of the private party and the government "is sufficient to satisfy a proposed intervenor's 'minimal' burden of showing that representation of its interests by existing parties may be inadequate." 792 F.2d at 193 (citations omitted). See also *Hooker Chemicals & Plastics*

Corp., 749 F.2d at 985-986 (denying intervention because the United States' obligations did not conflict with citizens' interest in abating pollution); cf. *United States* v. *Stringfellow*, 783 F.2d 821, 827-828 (9th Cir. 1986) (rejecting *Hooker* but recognizing that the relevant inquiry is whether the private and public interests coincide), vacated on other grounds, 480 U.S. 370 (1987). In challenging the presumption here, petitioners cite no case in which the United States and the proposed intervenors shared the same objective and yet intervention was allowed. Pet. 16-22.[1]

The courts below found that petitioners and the United States shared the identical goal of desegregating the Lubbock schools, and that the United States had diligently and in good faith pursued that goal over the last 20 years. App., *infra*, 7a; Pet. App. A6-A7. As petitioners concede, mere disagreements as to strategy do not demonstrate inadequacy of representation. Pet. 26-27. Under those circumstances, the courts below did not err in presuming that the United States adequately represented petitioners' interests in a desegregated school system. In so holding, the Fifth Circuit agreed with the only other circuit

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[1] In *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), an antitrust case, this Court noted that Fed. R. Civ. P. 24 was broadened in 1966 to allow intervention when the proposed intervenor has " 'an interest' in the 'transaction which is the subject of the action.' " 386 U.S. at 135 (quoting Rule). The Court found in that case that the existing parties did not adequately represent the proposed intervenors' interests precisely because the private and public interests in divestiture were not the same. 386 U.S. at 135-136. Conversely, in *Stotts* v. *Memphis Fire Dep't*, 679 F.2d 579, 583 (6th Cir.), cert. denied, 459 U.S. 969 (1982), the court upheld the denial of intervention at least in part because the legally protectable interests of the proposed intervenors and the City were identical.

to consider intervention on the United States' side in a school desegregation case. In *United States* v. *South Bend Community School Corp.*, 710 F.2d at 396, the Seventh Circuit similarly held that unless there is collusion, bad faith, or incompetence on the part of the government, when the proposed intervenors and the United States "want[] the same thing * * * —desegregating the * * * public schools," the United States is presumed to be an adequate representative.

Even if the court of appeals had erred in presuming that the government adequately represented petitioners' interests, its affirmance of the district court's order denying intervention would have been correct. The district court did not rely exclusively on the presumption, as it concluded that "in addition" to petitioners' failure to overcome the presumption, the preponderance of the evidence demonstrated the adequacy of the United States' representation. App., *infra*, 8a-9a. The court credited none of petitioners' criticisms of the United States' litigation of the case, finding instead that "[t]he record in this case is replete with adequate and full representation by the Government on the issues before this Court." App., *infra*, 7a. Petitioners thus failed to show—under any standard—that the United States did not adequately represent their interest in desegregation.

2. On January 17, 1992, the United States moved to dismiss its appeal of the order on the merits, and the court of appeals granted that motion on January 21, 1992. Pet. App. C. Because the court had dismissed the case, it did not allow petitioners to file their subsequent motion to intervene, dated January 30, 1992. Pet. App. D. Petitioners contend that the Fifth Circuit should have allowed them to intervene to appeal the district court's order on the merits after the court of appeals dismissed the United States' appeal. Pet. 26-28.

Petitioners are incorrect that the United States' decision not to pursue an appeal constitutes "changed circumstances" justifying their intervention on appeal. Petitioners have not suggested any grounds for a successful appeal of the district court's order on the merits. They focus on the "points of disagreement" with the school district's plan and their desire to bring those factual disagreements before the Fifth Circuit. Pet. 29. They do not even allege, however, that the district court committed legal error or that any of the district court's factual determinations, set out in a lengthy opinion (Pet. App. B1-B72), were clearly erroneous. In the absence of demonstrated legal or factual error on the part of the district court, there is no basis for finding that the United States' decision not to pursue an appeal—after it had litigated the case for 20 years and appealed to the Fifth Circuit twice (Pet. App. B6-B8)—proved that the United States did not adequately represent petitioners' interests. *Spangler* v. *Pasadena City Bd. of Educ.*, 427 F.2d 1352, 1354-1355 (9th Cir. 1970), cert. denied, 402 U.S. 943 (1971); *Alleghany Corp.* v. *Kirby*, 344 F.2d 571, 574-575 (2d Cir.), cert. granted, 381 U.S. 933 (1965), cert. dismissed, 384 U.S. 28 (1966). In short, petitioners' disagreements with LISD's policy choices, which have no demonstrable effect on interests properly asserted in a school desegregation case, do not justify prolonging the litigation further.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1992

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. CA-5-806

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

TEXAS EDUCATION AGENCY (Lubbock Independent School District), Et Al., DEFENDANTS

ORDER

[Filed Jun. 11, 1991]

The above entitled action concerning segregation in the public school system of the Lubbock Independent School District (LISD) was first filed by the Department of Justice against the LISD and its trustees in August of 1970. When the LISD is referred to herein as defendant, such term will include all of the defendants who have been named as the present trustees as well as their predecessors in office, all in their official capacity.

Before the Court at this time is a motion by LISD to modify the attendance and boundary zones of various schools in the district and to consider changes in the magnet program; a motion of certain individuals to intervene in opposition to LISD's proposed modification and a motion by defendants to dismiss the proposed "Claim for Which Intervention is Sought."

Those seeking to intervene have varying interests which allow them standing to file their motion to intervene, such interest being set forth in detail in the Magistrate Judge's "Findings, Conclusions and Recommendations."

The motion by the Proposed Intervenors was referred to a Magistrate Judge with authority to conduct a hearing and file findings, conclusions and recommendations with this Court on the motion to intervene. The Magistrate Judge has filed this report and the parties have filed objections and arguments and briefs in support of and in opposition to the requested intervention. The record of the hearing before the Magistrate Judge was transcribed into three volumes consisting of 449 pages.

This Court has read and carefully considered the transcript of the hearing as well as all of the submissions of the parties. Based upon the Magistrate Judge's findings, he concluded that the motion to intervene should be denied and so recommended to this Court.

After independently considering the pleadings of the parties, the transcript of the hearing before the Magistrate Judge, and the briefs and argument of all counsel [1], the Court is of the opinion that this Order should be entered adopting and finding as correct each of the findings and conclusions of the Magistrate Judge, and they are here adopted as the findings and conclusions of this Court.

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[1] Amicus Curiae Briefs have been filed by (1) the NAACP of Lubbock; (2) the League of Women Voters of Lubbock; (3) the League of United Latin American Citizens Council #4449 and the American GI Forum of Lubbock; and (4) Ken L. Hargesheimer and other specific parties named in such Brief.

Having considered the objections to the findings and conclusions of the Magistrate Judge, the Court is of the opinion and finds that such objections are without merit and not supported by the record in this case. ACCORDINGLY, the objections by the Proposed Intervenors to the Magistrate Judge's rulings are OVERRULED AND DENIED.

As indicated, this case was originally filed over 20 years ago and the United States of America, through the Department of Justice, has remained the Plaintiff in the case and the LISD and the various individual trustees and their successors, in their official capacity, have remained as the Defendants. In addition, the Texas Education Agency was originally named as one of the parties and still remains in the case and has participated in the proceedings concerning the proposed intervention.

When this suit was originally filed, it was alleged that the LISD was operating a dual school system which discriminated against minority students. The Brief in Support of the Motion to Intervene sets forth in fairly accurate detail the history of this litigation which has lead to the point where we are today.[2]

By Order of May 2, 1988, based upon the Consent Decrees entered in this case and an Agreed Record, the operation of LISD was found and declared to be in accordance with the laws and constitutional requirements and was declared to no longer be a dual system, with the Court retaining jurisdiction for a period of not less than three years. At the conclusion of this three year period, opportunity would be given to show cause why the case should not be dismissed and the injunctions dissolved.

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[2] See Proposed Intervenor's Brief at pages 1-7

The LISD has now designated the site for the new junior high school to be built pursuant to the Consent Decree of March 2, 1988; however, instead of filing its proposed modification plan as it affects only the junior high schools brought about by the building of the new junior high school, the LISD now seeks to make numerous modifications to the existing desegregation plan. It is this proposed modification which prompted the Proposed Intervenors to file their Motion to Intervene, along with their proposed complaint in intervention, designated as their "Claim for Which Intervention is Sought." [3]

The Proposed Intervenors seek to intervene, claiming basically that (1) the LISD has violated prior Orders by failing to implement prior desegregation plans; (2) the proposed plan is "inadequate, discriminatory and resegregative; and (3) the injunctions in effect should not be dissolved.

The Proposed Intervenors seek intervention pursuant to both Fed. R. Civ. P. 24(a) (intervention as a matter of right) and 24(b) (permissive intervention).

The Magistrate Judge's "Findings, Conclusions and Recommendations," which are adopted herein by reference and made findings and conclusions of this Court, set forth the requirements for intervention of right [4] and adequately discusses the first three re-

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[3] Pursuant to Fed. R. Civ. P. 24(c)

[4] (1) The Motion for Intervention must be timely;

(2) The Movants must have an interest relating to the transaction which is the subject of the ongoing action;

(3) The Movants must be so situated the disposition of the action may as a practical matter impair or im-

quirements. Because this Court finds that the Proposed Intervenors have failed to overcome the fourth test for intervention of right, i.e. inadequate representation by the Government of the Proposed Intervenors' rights and interests, it is not necessary to discuss the other three requirements, which have been fully discussed by the Magistrate Judge.

The Fifth Circuit in *Bush v. Viterna*, 740 F.2d 350, 354 (5th Cir. 1984), found that:

> "If a would-be intervenor fails to meet any one of these requirements then it cannot intervene as a matter or right"

The test in the Fifth Circuit is that "when the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance." *Bush*, 740 F.2d at 355. *See also Kneeland v. National Collegiate Athletic Ass'n*, 806 F.2d 1285, 1287 (5th Cir. 1987) cert. denied 484 U.S. 817 (1987). Therefore, the Proposed Intervenors must show an adversity of interest on the part of the Government, collusion between the Government and the LISD, or nonfeasance on the part of the Government. This the proposed intervenors have failed to do.

Fifth Circuit precedent establishes that "the inquiry under subsection (a)(2) is a flexible one,

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pede their ability to protect their interest in the litigation; and

(4) The Movants' interest must be inadequately represented by the existing parties to the ongoing litigation.

Fed. R. Civ. P. 24(a)

> which focuses on the particular facts and circumstances surrounding each application . . . [and] intervention of right must be measured by a practical rather than technical yardstick." *U.S. v. Texas Eastern Transmission Corp.*, 923 F.2d 410, 413 (5th Cir. 1991) citing *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 841 (5th Cir. 1975), cert. denied. 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

Insofar as adversity of interest, the Proposed Intervenors have admitted that their ultimate goal is a desegregated school system. That also is the ultimate goal of the Government.

As found by the Magistrate Judge, both the Proposed Intervenors and the Government have the same ultimate objective—desegregation. The Proposed Intervenors, however, complain that because the Government is not here in Lubbock, Texas, on a day-to-day basis, it does not possess local knowledge and concerns for the issues. However, when questioned, most of the Proposed Intervenors acknowledged that they had never attempted to directly communicate their position to the Government. In fact, the Proposed Intervenors did not really seem to understand the proposed modification because most responses were to the effect that either their attorneys had that knowledge or that experts had been hired by their attorneys to analyze the proposed modification.

> A subjective comparison, however, of the conviction of defendants and intervenors is not the test for determining adequacy of representation. Adequacy can be presumed when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interests of the proposed inter-

venor. *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985) cert. denied 474 U.S. 980 (1985).

The record shows that the Government has objected to the proposed modification, in certain respects, and the Court finds that no adversity of interest has been shown.

In an attempt to show collusion between the Government and the LISD, Proposed Intervenors focused on a recent meeting where members of the LISD administration and Board of Trustees, along with LISD attorneys, traveled to Washington to meet with Government attorneys. The Court finds that this does not show collusion, but indicates a willingness on the part of the LISD and the Government to do their job. In fact, the November 2, 1987, Consent Decree requires the LISD to submit proposed modifications to the Government for approval; and then, in the event agreement cannot be reached, the parties are to then submit the dispute to the Court for resolution. That is not collusion between the parties, but an attempt to follow Court Orders, as well as ordinary negotiations in an ongoing lawsuit.

Failing in showing adversity of interest or collusion, the Proposed Intervenors must then show nonfeasance and that the Government has failed in its duty of adequate representation. As noted earlier, this case was initially filed by the Government in August, 1970. Over the years, numerous Orders have been entered by this Court, some over the strenuous opposition of the Government. Some Orders have been appealed. The Government has had numerous attorneys working on this case over the past 21 years. The record in this case is replete with adequate and full representation by the Government on the issues before this Court.

The Proposed Intervenors attempt to show that because other parties were allowed to intervene in prior proceedings and as a result thereof, a new junior high school is to be built, that this shows inadequate representation on the part of the Government. As a part of this argument, they argue that the Government's attorney failed to attend the hearing on the site location for the new junior high school. The record reflects that Franz Marshall, the Government's attorney, notified the Court in writing of the Government's position and also filed a post hearing brief. It is also noted that even one of the attorneys for the then intervenors did not appear at the hearing. The prior intervenors were adequately represented at the location hearing by their retained attorneys; therefore, it was not incumbent upon the Government attorney to represent the then intervenors' interest at that hearing. In fact, the record indicates that the Government has urged the same building location as sought by the minority interests.

The Proposed Intervenors have wholly failed in showing inadequate representation on the part of the Government. While the presumption of adequate representation may be rebutted on a "relatively minimal showing," the Proposed Intervenors "must 'produce something more than speculation as to the purported inadequacy." *League of United Latin Amer. Citizens v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989), citing *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979). The Proposed Intervenors have not overcome the presumption of adequate representation and in addition thereto, the record and testimony before this Court establishes by a preponderance of the evidence that the Government has in the past adequately represented the interest

of the Proposed Intervenors and will continue to do so in the future. Therefore, the Court finds that Proposed Intervenors are *not* entitled to intervene as a matter of right.

Once intervention of right is denied, the Court next looks to permissive intervention.

> A court may grant permissive intervention under Rule 24(b) only if three conditions are met: (1) the movant must show an independent ground for jurisdiction; (2) the motion must be timely; and (3) the movant's claim or defense and the main action must have a question of law and fact in common . . .
>
> The existence of a common question of law or fact does not automatically entitle an applicant to intervene. Rather, rule 24(b) necessarily vests "discretion in the district court to determine the fairest and most efficient method of handling a case. . . ." [citations omitted]
>
> In exercising its discretion to grant or deny permissive intervention, a court must consider whether the intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." Rule 24(b).
>
> In addition to the interests of the original parties, a court in deciding whether to permit intervention should evaluate whether the movant's "interests are adequately represented by existing parties." [Citations omitted] . . .
>
> Finally, judicial economy is a relevant consideration in deciding a motion for permissive intervention. [Citations omitted].

Venegas v. Skaggs, 867 F.2d 527, 529-531 (9th Cir. 1989) aff'd on other grounds —— U.S. ——, 110 S.Ct. 1679 (1990).

The Fifth Circuit has found that permissive intervention is discretionary with the District Court. *See Kneeland*, 806 F.2d at 1289; *U.S. v. Texas Eastern Transmission Corp.*, 923 F.2d at 413.

In addition to the three factors considered by the Magistrate Judge, i.e. (1) timeliness, (2) common facts or law, and (3) prejudice to the parties,[5] an additional factor to be considered in determining permissive intervention is "whether the intervenors' interests are adequately represented by other parties." *Kneeland*, 806 F.2d at 1289; *League of United Latin Amer. Citizens*, 884 F.2d at 189. As discussed hereinabove, the Court finds that the Proposed Intervenors have not overcome the presumption of adequate representation on the part of the Government, and therefore, denies permissive intervention. The Court also finds that prejudice to the existing parties would result if permissive intervention is allowed. Such prejudice would include delay, unnecessary costs, and reduced control over the lawsuit. *See Tasby v. Wright*, 109 F.R.D. 296 (N.D. Tex. 1985).

The Court therefore finds that the Proposed Intervenors' Motion to Intervene, with the accompanying proposed pleading setting forth the claim for which intervention is sought, both as a matter of right and with permission, should be and the same is hereby DENIED.

The Court does find that the Proposed Intervenors should be granted amicus curiae status in the case. *See Bush*, 740 F.2d at 359. Accordingly, the Proposed Intervenors may give such input directly to the Government as they desire, and shall further be permitted to file their Amicus Curiae Brief stating their position regarding the proposed modification of the

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[5] *Bush v. Viterna*, 740 F.2d at 359; Fed. R. Civ. P. 24(b).

desegregation plan. Such Brief shall be limited to 25 pages and shall be filed on or before June 20, 1991.

In addition to filing its opposition to the proposed intervention, the LISD has also filed a "Motion to Dismiss Proposed Intervention, Alternatively Motion to Disqualify Counsel, and Motion to Limit Scope of Hearing on Proposed Intervention." A Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) goes to the merits of the claim and should not be granted unless the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45 (1957). As this Court has denied intervention, the Motion of LISD to Dismiss is moot. The Court further finds that the Motion to disqualify is without merit and is therefore denied. The Magistrate Judge limited the scope of the evidentiary hearing at the time of the hearing and that limitation is affirmed by this Court.

IT IS SO ORDERED.

The Clerk shall furnish a copy hereof to all attorneys of record, including the attorneys for parties who have previously been granted amicus curiae states.

Dated June 11, 1991.

/s/ Halbert O. Woodward
HALBERT O. WOODWARD
Senior United States
District Judge

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